

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

77-2018

B
P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-2018
Calendar No. 1075

MICHAEL J. MURELLO,

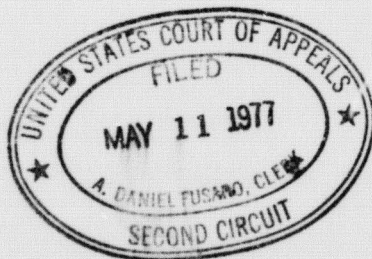
Appellant,

-against-

THE SUPREME COURT, STATE OF NEW YORK
COUNTY OF KINGS; and THE HON. EUGENE
GOLD, DISTRICT ATTORNEY, KINGS COUNTY,

Appellees.

PETITION FOR REHEARING



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PETITION FOR REHEARING

Preliminary Statement

This cause was argued on April 25, 1977, before Judges Mansfield, Palmieri and Smith. At the conclusion of argument, Judge Mansfield announced the panel's decision to affirm. The judgment entered thereon is dated April 27, 1977. This petition for rehearing is being filed within the time allowed by FRAP 40.

Basis for Granting This Petition

In the original petition filed in the Eastern District it was alleged that Murello pleaded guilty without knowledge that there was a "condition" attached to the promised disposition of probation and fine (see Joint Appendix, A-4, para. 12 of the petition filed below). That allegation is supported by Murello's affidavit annexed to the petition filed below (Joint Appendix, A-9-10).

In the brief before the district court and in the brief before this court, one of the points urged was that the plea was involuntary because made by Murello without full knowledge of any terms and conditions attached. (see Brief for Appellant before this court, Point III, pp.20-21).

Among the authorities cited in that point are *Machibroda v. United States*, 368 US 487, and *Allison v. Blackledge*, 533 F.2d 894, (4th Cir. 1976). Allison was cited in the following context;

"Similarly where a defendant pleaded guilty in reliance on an unkept representation of his attorney it was held error for the district court to deny the petition for habeas corpus without conducting an evidentiary hearing to determine the truth of what defendant alleged. Allison v. Blackledge, 533 F.2d 894 (4th Cir. 1976); Cert. gtd 97 S.Ct. 379 (1976).

"Therefore, the judgment of dismissal should be reversed and the case remanded for an evidentiary hearing on the ground that the pleas were given involuntarily."

(Appellant's brief before this court, p. 21).

On May 2, 1977, one week after the argument of this case, the Supreme Court affirmed the Fourth Circuit in *Blackledge v. Allison*,
US (No. 75-1693).

The Supreme Court's decision, we submit, stands for the proposition that if the allegation of the petition are neither "palpably incredible", nor "patently frivolous or false" then the petition should not be summarily dismissed. At this juncture it should be noted that, like the defendant Allison, Murello was

catechized by the trial judge at the time the plea was taken, and during that process gave the standard negative answer to the standard question whether any promises had been made concerning sentence (see Joint Appendix, pp. A-26-27). Subsequent remarks made by both the trial judge and Murello's trial counsel indicate that at least these two people understood that there was some deal (see Joint Appendix, pp. A-20-22; A-12-13). But the pivotal issue in this case is whether Murello fully understood the terms and conditions of the deal. He says he did not. Our point is that this allegation must be tried out at an evidentiary hearing upon the authority of Blackledge v. Allison, supra.

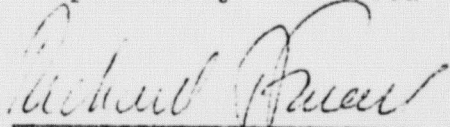
Conclusion

This petition for rehearing should be granted, and the matter remanded to the Eastern District for an evidentiary hearing. In the alternative the matter should be set down for reargument in light of the decision of the Supreme Court in Blackledge v. Allison, supra.

DATED: Brooklyn, New York

May 11, 1977

Respectfully submitted



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United States Court of Appeals
For the Second Circuit

Murello

-against-

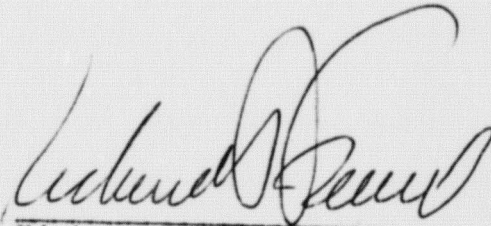
The Supreme Court, State of New York,
et. al.

Affidavit of
Service

Richard T. Farrell, being duly sworn deposes and says:
On the 11th day of May, 1977 I served a copy of the
Petition for Rehearing upon the attorney for the
Appellees by mailing a copy to the following address:

Hon. Louis Lefkowitz
Attorney General
State of New York
Two World Trade Center
New York, New York 10047

Sworn to before me this
11th day of May, 1977



Richard T. Farrell
250 Joralemon Street
Brooklyn, New York 11201


Notary Public

JOSEPH CREA
Notary Public, State of New York
No. 24-0799450
Qualified in Kings County
Commission Expires March 30, 1979

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